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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 290

M. EDWARD BUCKLEY, JR.,
Petitioner,

vs.

DISTRICT OF COLUMBIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

M. EDWARD BUCKLEY, JR.,
Pro se.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 290

M. EDWARD BUCKLEY, JR.,

Petitioner,

vs.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

Petitioner, M. Edward Buckley, Jr., in the causes pending in the United States Court of Appeals for the District of Columbia, entitled "District of Columbia vs. M. Edward Buckley, Jr., number 7959" pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered on March 30, 1942, setting aside the order of Judge Newman, sustaining the petitioner's plea in bar.

Statement of Case.

Defendant below was charged with operation, on July 21, 1940, of a motor vehicle while under the influence of intoxicating liquor (R. 6). To this information defendant entered a plea of "Not Guilty" and demanded trial by jury. Thereafter, on October 30, 1940, an Assistant Corporation Counsel entered a nolle prosequi to this information, No. 484,063 (R. 7). Subsequently, on January 13, 1941, defendant entered a plea of "Guilty" to an information, No. 497,300, charging a violation of one of the traffic regulations of the District of Columbia (operating a motor vehicle and failing to keep to the right of the street). On defendant's plea of guilty a judgment was entered and a fine of $25.00 was imposed by Judge Newman, one of the Judges of the Police Court (R. 30). On February 25, 1941, information No. 501,335, charging defendant with a violation of an Act of Congress relating to the operation of a motor vehicle while under the influence of intoxicating liquor was filed in the Police Court (R. 1-3). This information was practically the same as No. 484,036, heretofore referred to. To this information defendant filed an amended plea in bar of autrefois convict. The District of Columbia then filed a replication, to which replication defendant filed a demurrer. On hearing before Judge Neilson, one of the Judges of the Police Court, the demurrer was overruled and the case ordered to trial (R. 3-18). On June 20, 1941, while Judge Neilson was presiding in the jury branch of Police Court, defendant withdrew his demand for jury trial and moved the Court to certify the case to the traffic branch of the Police Court in which Judge Newman was presiding. When the case was called before Judge Newman, defendant moved the Court to allow him to withdraw his plea of not guilty and to reenter his plea in bar (R. 4). The District of Columbia objected to the defendant's motion and gave

notice of its intention to apply to the Court of Appeals if the Court's determination was such that it would be entitled to an appeal (R. 31). Judge Newman ruled that defendant was entitled to withdraw his plea of guilty and enter a plea in bar (R. 4). Thereafter Judge Newman called for argument on the issue of double jeopardy. Argument on this issue was had before Judge Newman in the same manner as if the issues presented to Judge Neilson on May 1, 1941 were ordered reheard (R. 30). On June 23, 1941 the Court ruled that the plea in bar of autrefois convict should be granted. To the decision which, in effect, sustained defendant's demurrer, the District of Columbia noted an exception in open Court and announced its intention to apply to the Court of Appeals for the allowance of an appeal (R. 31).

It is stated in Judge Newman's opinion (R. 19): "On January 25, 1941, the Corporation Counsel filed a new information against the defendant, again charging him with driving while intoxicated, which said charge, it is conceded, is the same as that for which the defendant was charged on July 22, 1940, and which said former charge the Corporation Counsel nol-prossed. It is also conceded that the charge of driving on the wrong side of the street, to which the defendant pleaded guilty, occurred at the same time at which the defendant was charged with driving while intoxicated." (Emphasis supplied.)

Statutes Involved.

Information 484,036 and 501,335 are based on an Act of Congress passed February 27, 1931, 46 Stat. 1424, chapter 317, 5th Supp. 1929 Code of Laws of the District of Columbia, Title 6, paragraph 247, Section (b):

> "No individual shall, while under the influence of any intoxicating liquor or narcotic drug, operate any

motor vehicle in the District. Any individual violating any provision of this subdivision shall upon conviction of the first offense be fined not more than $500 or imprisoned not more than six months, or both; * * * Upon conviction of a violation of any provision of this paragraph the Clerk of the Court shall certify forthwith such conviction to the designated agent of the Commissioners, who shall thereupon revoke the operator's permit of such individual."

Information No. 497,300 was based on Section 23, paragraph (a), Traffic and Motor Vehicle Regulations for the District of Columbia, amended June 6, 1939, which reads as follows:

"Vehicles shall be driven upon the right half of the highway and the driver shall drive as closely as practical to the right hand edge or curb of the highway."

Statement of Points.

Defendant intends to rely on the following points:

1. The Court did not err in sustaining defendant's plea in bar of former jeopardy.

2. The Court did not err in recognizing the agreement (express or implied) with the Government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to driving on the wrong side of the road, the lesser offense embraced therein.

Summary of Argument.

1. The Court did not err in sustaining the plea of former jeopardy. A single cause of action consisting of the continuous operation of an automobile cannot be split into a multiplicity of offenses, when the splitting of such causes would result in gross injustice to the accused and would result in persecution rather than prosecution. There is

specific authority for holding that when the defendant is charged with speeding, and driving while drunk, a prosecution on the former charges precludes the government from prosecuting on the latter. If all of the facts are before the prosecutor at the time action is initiated, he has an option as to the charges to be brought, and a failure to bring action other than that initiated is a waiver of other charges involved in the same act.

2. The Court did not err in recognizing the agreement (express or implied) with the government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to a lesser offense. The prosecutor is primarily charged with what charges, if any, shall be brought, and whether such charges shall be prosecuted. He is the sole judge as to the initiation of action and its continuance; the court has no power with respect to either. Public records disclose hundreds of cases in which the prosecutor has accepted a plea of guilty to a lesser offense. To hold that such persons may be thereafter held to answer for the greater would be a perversion of justice. The prosecutor, in the light of indicated statistics, and on principles of common justice, should be held to his agreements.

Arguments.

I.

Protection against double jeopardy is no invention of the Courts, but a right guaranteed by the Constitution of the United States. "No person * * * shall be subject for the same offense to be twice put in jeopardy of life or limb." (U. S. Constitution, Art. V, Amed.) Similar provisions are found in most, if not all, of the States. If the defendant has a right guaranteed by the Constitution, no amount of vituperation will deter this Court from protect-

ing him in its exercise. Cases here—and in all courts—must be decided on the principles of justice and not of popular clamor for a victim of the moment.

> "The legal question then comes to this: "Is a former conviction for the offense of driving on the wrong side of the street a bar to subsequent prosecution for the offense of driving while under the influence of intoxicating liquor, where both offenses arise out of the same transaction?"

In *Trawick* v. *City of Birmingham*, 23 Ala. A. 308, 125 So. 211, decided in 1929, the defendant was charged with speeding and convicted. Thereafter he was charged with having been intoxicated on the same occasion. A plea of former jeopardy was sustained by the appellate court. In the course of its opinion the court said:

> "The driving of this automobile by this defendant while he was intoxicated and the driving of the automobile by the defendant at an unlawful rate (speeding) were, though separate and distinct offenses, violations of separate and distinct ordinances, the outgrowth of one act. While, as argued by counsel, one might be guilty of driving while intoxicated and yet drive in a lawful manner, or might drive at a reckless rate of speed and still be sober, still the fact persists that they arose out of the same act. To permit the splitting of the one act into two offenses would be no different from allowing one to be prosecuted twice for firing one shot that killed two persons, or killed one and wounded another; or where the one act of introducing a file into a prison brought about the escape of two prisoners; or where one person had at the same time in his possession two receptacles each containing prohibited liquor. Indeed, it is conceivable, and quite probable, that this appellant violated, in addition to the ordinances noted, other ordinances having to do with traffic regulations."

The same ruling was followed in *Landers* v. *State*, 26 Ala. App. 506, 162 So. 550, decided in 1935. In that case the defendant was charged in two counts, first: driving while intoxicated, and, second: driving "carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger" persons or property.

The testimony indicated that both charges grew out of the same transaction. The jury convicted the defendant on both counts, after the court had refused to charge the jury: "You cannot find defendant guilty under both counts of the complaint." The court's refusal so to charge was held error on appeal—the appellate court saying:

> "It has long been the rule of Alabama courts that, where an indictment, information or affidavit, in a criminal case contains several counts arising out of the same offense, a verdict of the jury finding the defendant guilty on one of the counts operates as an acquittal as to the other counts. (And cases cited).
>
> "What we have written above being true, and it being the law that "one single transaction or state of facts cannot be so split up as to convict the defendant of several separate and distinct offenses" (citation) it becomes apparent that appellant was entitled to have given at his request written charge 2 quoted above."

The foregoing cases are directly in point. The Government cites cases to the contrary. Modern justice is now engaged in weeding out and over-ruling outmoded decisions. Neither a multiplicity of decisions on a particular subject, nor their antiquity, is indication that the cases are fundamentally right, or that they should be followed. One case to the contrary today may (and should) turn the stream of justice into a more enlightened course.

Even the lack of precedents can be overcome by this Court creating them. This thought was expressed by Mr. Justice Walter J. Lindley in the course of his unreported opinion (but which is a part of the record in the case) in *United States* v. *General Motor Corporation, et al.*, (reported on appeal in 121 F. (2d) 376):

> "I observed in a late opinion of the Supreme Court of the United States that one of the justices recently appointed expressly said that the court had been reconstructed. The fair implication of that opinion, as I read it, is that precedents may be of little avail and lack no bar."

This court is called upon to decide just how far one continuous act may be split up into many separate offenses. There must be some limit to the governmental power in this respect.

In the course of continuously driving an automobile down one street, the defendant may exceed the speed limit, then slow down, then resume his former speed; on several occasions he may go slightly to the wrong side of the road. The question is: to what extent can the government take each of these violations as separate offenses—return an information in many counts, including, perchance, additional charges of driving while drunk and reckless driving—and secure convictions on all the charges preferred? If the answer be in the affirmative, and the full penalty of the law is imposed in each instance, with sentences to run consecutively, the defendant might spend the rest of his life imprisoned—all for one continuous drive in one city block. This cannot be a modern concept of justice.

If the prosecutor has all the facts before him, as in this case, it would seem that in justice to the defendant, the prosecutor should prefer charges for all known offenses growing out of the same transaction—or that charges not preferred could not again be prosecuted.

The government refers (R. 10) to *Hopkins* v. *U. S.*, 4 App. D. C. 430. In that case a charge of assault was preferred at a time when the victim was still alive—at which time no other charge could be brought. The government had no election. Later the victim died—and the defendant was then charged with murder. The court held that there was no former jeopardy because of the lack of power in the government to prosecute for the offense of murder at the time the first prosecution was initiated.

In the instant case, the government had all of the facts before it and elected to proceed on the charge of driving on the wrong side of the street. In so doing, the government should be held to have waived its right to prosecute for other offenses (if any) committed at the same time as a part of the same continuous transaction.

II.

The Court did not err in recognizing the agreement (express or implied) with the government that the charge of driving while intoxicated would be dismissed upon a plea of guilty to driving on the wrong side of the road, the lesser offense embraced therein.

The first and second points of petitioner's argument run together in many instances, and in part overlap.

Judge Newman's opinion (R. 27) takes into consideration the fact that it is within the power of the prosecutor to determine the charge to be preferred, the necessity for the further prosecution of the case, the substitution of lesser charges (with or without an agreement between the prosecutor and the accused). He held that express or implied agreements between the prosecutor (representing, as he does, the power and authority of the government) and the accused, for the withdrawal of a higher charge for a plea of guilty to the lesser charges, requires the court to carry out such agreement, even if the prosecutor refuses to do so.

With respect to any agreement between the government and the accused as to the withdrawal of the higher, and the substitution of the lesser, charge, reference is made to the opinion of Judge Newman (R. 27), which should be considered by the court as a part of the record under the Act of Congress of March 3, 1911, c. 231, sec. 269, 36 Stat. L. 1163, as amended; (Title 28, sec. 391 U. S. C.), requiring the court to determine the case "after an examination of the entire record before the court".

In *West Virginia* v. *Ward*, 112 W. Va. 522, 165 S. E. 803, 85 A. L. R. 1175 the defendant was indicted in 14 counts for violations of the banking laws. It was agreed between the State and his counsel that (subject to the approval of the court) the defendant might plead guilty to one count and the others would be nolled. The court approved the agreement, accepted a plea of guilty on the first count, sentenced the defendant thereunder, and the other counts were dismissed. After the defendant had served his term, the attorney general caused him to be re-indicted under the other 13 counts. A demurrer to a special pleas was sustained by the trial court—and the ruling was reversed on appeal.

In the course of its opinion, the appellate court calls attention to the fact that the attorney general in England had the sole power to enter a nolle prosequi "by virtue of the office and the law" in the absence of a statute to the contrary.

There are no statutes in force in the District of Columbia requiring the approval of the court to the entry of a nolle—and the prosecutor's judgment, on the necessity for the entry must be taken as final. There is, therefore, no merit to the contention of the author of the note in 85 A. L. R. 1177 (cited in the government's brief on page 20) that:

> "* * * The fact that the agreement was approved by the trial court is, of course, of vital importance.

> "It does not appear in any of the other cases which have been found, that the trial court had sanctioned the agreement in question."

If the government's contention be correct, how can the sanction of the court give greater weight to an act which only the prosecutor has the undisputed right to do?

In *People* v. *Johnson,* 372 Ill. 18, 22 N. E. 683 the court said:

> "The People acting through their duly constituted authorities reached an agreement with the defendants at the time the motion was made to strike the indictment. In pursuance of this agreement the People accepted $21,000. In view of these payments by the defendants the prosecuting officers are in honor bound to carry out the terms of their agreement. If the administrative and prosecuting agencies of the People fail to keep their legitimate agreements, public policy and the great ends of justice require the court to prevent such breaches of the faith." (Emphasis supplied.)

If such agreements, express or implied, are not kept, the administration of justice would be seriously hampered, the prosecutor's office brought into a position where its solemn promises would be treated as worthless, and the public faith in the entire judicial system undermined. Must the prosecutor be compelled to resort to a subterfuge in order to keep his agreements in respect to the entry of a nolle prosequi —namely, to call the case, have a jury impanelled, call a witness, have him sworn—and then enter a nolle? Such a procedure would result in jeopardy. Is it not more consonant with principles of common justice to support the original action of the prosecutor in dismissing the higher charge and accepting a plea of guilty to the lesser?

A decision refusing to uphold the prosecutor's power to accept a plea of guilty to a lesser offense would have far reaching consequences.

The records of the Police Court of the District of Columbia are public records, of which this court may take judicial note. Those records disclose that, as far as drunken driving cases are concerned:

In 1940 in cases where defendant was imprisoned pending trial:

163 were arrests
50 cases had no prosecution or had charges entered for lesser offenses.

In 1940 in cases in which defendant gave bond:

218 arrests
129 altered to lesser offenses.

In 1941 through Sept. 22 (imprisonment pending trial):

152 arrests
22 altered to lesser offenses, or no charge.

In 1941 through Sept. 22 (released on bond):

33 arrests
31 in which no papers were filed, were nolled or reduced to lesser offenses.

It would, therefore, appear from this record that there are now in the District of Columbia some 233 persons who may, at the caprice of the prosecutor, be arrested and charged with drunken driving, notwithstanding the fact that charges against them have been nolled, or that they pleaded guilty to, or were convicted of, lesser offenses, and have paid their fines or served their sentences, or both, as a result of an express or implied agreement with the prosecutor as to what, under oath, he regarded the particular course to best subserve the enforcement of law.

On this showing, is not the prosecutor bound to keep faith —and if he does not, is it not the bounden duty of this court to compel him so to do?

Conclusion.

The concluding paragraphs of the opinions in the Police Court Judges are identical, namely:

> "It might be added, however, that this Court would welcome further expression from our Court of Appeals on the precise point involved in respect to cases dealing with traffic, and it is suggested that counsel for defendant, in his discretion, take steps looking to further expression on this proposition from that tribunal."

It is respectfully submitted that the Police Court should not be instructed as to matters of procedure at the expense of the substantial rights of the defendant.

For the foregoing reasons, it is respectfully submitted that the order of Judge Newman sustaining the petitioner's plea in bar should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 290

M. EDWARD BUCKLEY, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Brief of the Respondent District of Columbia in Opposition to Petition for Writ of Certiorari.

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CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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M. EDWARD BUCKLEY, JR.,

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Brief of the Respondent District of Columbia in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The facts are sufficiently stated in the petition and in the opinion of the United States Court of Appeals for the District of Columbia and will not be repeated.

SUMMARY OF ARGUMENT

1. Judge Newman was without authority to rehear the question of the sufficiency of the plea of former jeopardy previously passed upon by Judge Neilson. Both of these judges are judges of the Police Court of the District of Columbia. The District of Colum-

bia Code provides that the decision of one judge of that court on the court's business shall be the decision of the court. This is also the Federal rule. Judge Neilson, in a memorandum opinion, held that petitioner's conviction of the offense of driving on the wrong side of the street was not a bar to his prosecution for driving while under the influence of intoxicating liquor, and ordered that the case proceed to trial on its merits. Such a decision was the decision of the Police Court and was not subject to being reheard and overruled by Judge Newman.

2. Petitioner relies on the defense of double jeopardy, contending that his plea of guilty to an information charging him with a violation of that District of Columbia traffic regulation which requires drivers of motor vehicles to keep to the right of the center of the street, prevents the District of Columbia from instituting a prosecution against him for violating an Act of Congress prohibiting the operating of a motor vehicle while under the influence of intoxicating liquor. This Court has long recognized the rule that there must be an identity of offenses in order to raise the defense of double jeopardy. There is clearly no identify of offenses in this case. One could violate the regulation requiring that operators keep to the right of the center of the street without being guilty of operating a vehicle while under the influence of intoxicating liquor. Conversely one could be guilty of driving a vehicle while under the influence of intoxicating liquor without being guilty of violating the regulation requiring that operators keep to the right of the center of the street.

3. Petitioner relies further on estoppel, contending that, because the District of Columbia elected to prosecute him for the offense of driving on the wrong side of the street, it is estopped to prosecute him for the offense of driving while intoxicated. Such is clearly not the law. Petitioner's plea does not allege any agreement between him and an Assistant Corporation Counsel. Even if there were an agreement it would not be binding on the District of Columbia.

ARGUMENT

I

One Judge of the Police Court is without power to overrule the action of another Judge.

Judge Newman had no authority to permit petitioner to renew his plea in bar after said plea in bar had been disposed of by another judge of the Police Court. Section 44, D. C. Code, 1901, Section 11-601, Code of Laws of the District of Columbia (1940 Ed.) provides, in part, as follows:

> "* * * The judges shall have power to make rules for the apportionment of business between them and the act of each judge respecting the business of the court shall be deemed and taken to be the act of the court * * *".

Not only does the Code of the District of Columbia preclude the rehearing by another judge of such a matter as a plea in bar after another judge of the Police Court had finally determined that matter but also the uniform rule of the Federal Courts has for many years been the same in effect. The rule long recognized in Federal Courts is stated by the Circuit Court of Appeals for the Second Circuit in the case of *Commericial Union of America, Inc.* v. *Anglo-South American Bank, Ltd.*, 10 F. (2d) 937, as follows:

> "Judges of coordinate jurisdiction, sitting in the same Court and in the same case, should not overrule decisions of each other."

So carefully is this rule followed that the Court in the above case held that failure to follow this rule was sufficient grounds for reversal. Judge Rogers, speaking for the Court and con-

cluding the Court's opinion by referring to the rule heretofore quoted, said (p. 941):

> "For that reason and that reason only, the judgment is reversed, and the District Court is directed to reinstate the action and grant the motion to amend the complaint."

See also:

Jurgenson v. *National Oil & Supply Co.*, 63 F (2) 727.
Plattner Implement Co. v. *International Harvester Co.*, 133 F. 376.
Erie Transfer Co. v. *J. Cutler Iron Works*, 47 F. (2) 1074.
Wright v. *Barnard*, 264 F. 582.
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Taylor v. *Decatur Mineral & Land Co.*, 112 F. 449.
Shreve v. *Cheesman*, 69 F. 785.
Wakelee v. *Davis*, 44 F. 532, affirmed on other grounds, 156 U. S. 681.

Therefore, as Judge Newman had no authority to overrule the decision of Judge Neilson, the latter's decision must stand.

II

The Court of Appeals correctly held that Petitioner's prior conviction did not constitute former jeopardy.

The rule with respect to former jeopardy long recognized by this Court is to the effect that in order to invoke the defense of former jeopardy there must be an identity of the offenses in question. The question naturally arises as to whether or not the two offenses here involved, one set forth in Information No. 484,036, charging petitioner with operating a motor vehicle and failing to keep to the right of the center of the street, and the second set forth in Information No.

501,335, charging the petitioner with operating a motor vehicle while under the influence of intoxicating liquor, are identical. It is the position of the District of Columbia that in no sense are these offenses identical.

In *Burton* v. *United States,* 202 U. S. 344, the defense of double jeopardy was raised by the defendant by reason of the fact that in a previous trial of the case he had been acquitted of receiving money from one W. D. Mahaney, mentioned as an officer and employee of the Rialto Grain and Securities Company. In the subsequent indictment he was charged with having received such compensation from that corporation. This Court held that the two offenses were not identical, and that the acquittal under the indictment for the first was not a bar to a prosecution under the second indictment.

In the case of *Gavieres* v. *United States,* 220 U. S. 338, 31 Sup. Ct. 421, defendant there had been convicted under a Manila ordinance for behaving in a drunken and boisterous manner in a public place. This Court held that he was not twice put in jeopardy in a subsequent trial for outraging and insulting a public official by word of mouth in his presence, contrary to the provisions of the Philippine Islands Code. The two offenses grew out of the same transaction. Mr. Justice Day, speaking for this Court, said, page 341:

> "It is to be observed that the protection intended and specifically given is against second jeopardy for the *same offense.* The question, therefore, is, Are the offenses charged, and of which a conviction has been had in the municipal court and in the Court of First Instance, identical. An examination of the ordinance shows that the gist of the offense under it was behaving in an indecent manner in a public place, open to public view. It was not necessary to charge or prove under the municipal ordinance any outrage, insult or threat to a public official or agent of the authorities. The charge contained in the record shows that under the municipal ordinance the plaintiff in error was

charged with willfully and unlawfully, in a public street car and in the presence of numerous persons, including ladies, conducting himself in a reckless, indecent and discourteous manner.

"It is true that the acts and words of the accused set forth in both charges are the same; but in the second case it was charged, as was essential to conviction, that the misbehavior in deed and words was addressed to a public official. In this view we are of opinion that while the transaction charged is the same in each case, the offenses are different. This was the view taken in *Morey* v. *Commonwealth,* 108 Massachusetts, 433, in which the Supreme Judicial Court of Massachusetts, speaking by Judge Gray, held:

" 'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' "

As in *Morey* v. *Commonwealth,* 108 Mass. 433, it would be incumbent upon the prosecution in proving a case under Information 501,335, charging "Driving while under the influence of intoxicating liquor" to prove facts additional to and different from those necessary to support the simple charge presented in Information No. 484,036, charging this petitioner with driving an automobile and failing to keep to the right of the center of the street.

In the case of *Morgan* v. *Devine,* 237 U. S. 632, this Court held that the defendant, Devine, who had been convicted of breaking into a Post Office, and also committing larceny there-

in, and who had been convicted under separate counts of the same indictment and who had been sentenced to serve separately under each count was not entitled to be released on the ground of double jeopardy after having served his sentence under the first count. Defendant had claimed double jeopardy because the several acts charged were done at the same time and as part of one transaction. This Court said, page 639:

> "Notwithstanding there is a difference in the adjudicated cases upon this subject, we think the better doctrine recognizes that, although the transaction may be in a sense continuous, the offenses are separate, and each complete in itself. This is the result of the authorities as stated by Mr. Bishop in his new work on Criminal Law (Eighth Edition):
>
> " 'If in the night a man breaks and enters a dwelling house to steal therein, and steals, he may be punished for two offenses or one, at the election of the prosecuting power. An allegation simply of breaking, entering, and stealing states the burglary in a form which makes it single, and a conviction therefor will bar an indictment for the larceny or the burglary alone. But equally well a first count may set out a breaking and entering with intent to steal, and a second may allege the larceny as a separate thing, and thereon the defendant may be convicted and sentenced for both.' (Section 1062) . . . 'The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be.' (Section 1052, p. 630.)."

Applying the rule there approved by this Court to the instant case it can be demonstrated readily that the facts necessary to establish the charge of driving an automobile and failing to keep to the right of the center of the street would fall far short of establishing the charge of driving an automobile while under the influence of intoxicating liquor.

The United States Court of Appeals for the District of Columbia has consistently followed the rulings of this Court on the question of double jeopardy.

See:

Hopkins v. *United States,* 4 App. D. C. 430,
Nordlinger v. *United States,* 24 App. D. C. 406,
Monroe v. *United States,* 56 App. D. C. 80, 10 Fed. (2) 645,
Sims v. *Rives,* 66 App. D. C. 24, 84 Fed. (2) 871,
Berry v. *United States,* 72 App. D. C. 229, 113 Fed. (2) 183.

Some mention should be made of applicable State cases in which the defense of double jeopardy was raised concerning similar traffic offenses. In *State* v. *Garcia,* 198 Iowa 764, 200 N. W. 202, it was held that a conviction for intoxication is no bar to prosecution for driving an automobile while intoxicated. A conviction in the Municipal Court of the crime of driving an automobile while intoxicated is not a bar to prosecution for involuntary manslaughter. *People* v. *Townsend,* 214 Mich. 275, 16 A. L. R. 902. A conviction for reckless driving is no bar to a subsequent prosecution for driving an automobile while under the influence of intoxicating liquor, and a conviction for driving an automobile while under the influence of intoxicating liquor does not bar a prosecution for reckless driving. *State* v. *Sisneros,* 82 P. (2d) 274, 42 N. M. 500; *People* v. *McGrath,* 94 Cal. App. 520, 271 P. 549. In the case of *Woods* v. *State,* 15 Ala. App. 251, 73 So. 129, it was held that a conviction for reckless driving under a municipal ordinance was no bar to a charge of injurying property and leaving the place of injury without stopping.

Following the principle of these cases, it can readily be seen that the two offenses have no material relation to each other. One may drive on the wrong side of the street and be perfectly sober. Conversely one may be guilty of driving while under

the influence of intoxicating liquor while driving on the proper side of the street.

III

The District was not estopped to file a new information charging petitioner with driving while under the influence of intoxicating liquor.

Judge Newman of the Police Court, in granting petitioner's plea in bar raising the issue of double jeopardy, seemed to rely principally on the following proposition:

> "Bearing in mind the power of the prosecutor as heretofore discussed it would appear that in cases in which the prosecutor dismisses a higher charge and accepts a plea of guilty to a lesser one that the Court is in honor bound to carry out the implied (if not expressed) agreement between the Government and the defendant that the higher charge has been thereby finally disposed of."

A reading of petitioner's amended plea in bar attached to the bill of exceptions as Exhibit "A" fails to disclose any such agreement as Judge Newman indicates. The Court of Appeals held there was no such agreement, either express or implied. But even if the record did disclose such an agreement, the cases on the subject show conclusively that Judge Newman was not relying on the weight of authority in setting forth this proposition. See annotation in 85 A. L. R. 1177. The case of *West Virginia* v. *Ward*, 112 W. Va. 522, 165 S. E. 803, 85 A. L. R. 1175, is cited for the proposition that an agreement between a prosecuting attorney and an accused approved by the Court should be upheld ordinarily when the accused has fulfilled his part of the agreement. The annotation on this case says (p. 1177):

> "The reported case (State v. Ward, ante, 1175) is the only one found that has expressly enforced an agreement to accept a plea of guilty on one count and to give immunity by discharging other counts. The fact that the agreement was approved by the trial court is, of course, of vital importance.
>
> "It does not appear in any of the other cases which have been found, that the trial court had sanctioned the agreement in question."

In West Virginia the prosecuting officer cannot, contrary to the common law rule, enter a nolle prosequi except with the consent of the court. *Denham* v. *Robinson,* 72 W. Va. 243, 77 S. E. 970, 45 L. R. A. (N. S.) 45.

The only other case relied upon by petitioner is *People* v. *Johnson,* 372 Ill. 18, 22 N. E. (2) 683. That case involved the compromise of a tax claim in consideration of the abandonment of the criminal prosecution and comes within the classes of cases distinguished in the case of *Buie* v. *United States* (C. C. A. 5th) 76 Fed. (2) 848, certiorari denied 296 U. S. 585. There an indictment had been previously returned charging appellant, Buie, and five others with substantially the same offense charged in the case in which conviction was secured against him. A nolle prosse was entered in that case as to appellant, and two others, while the remaining three defendants entered pleas of guilty. The plea in bar alleged that appellant had entered into an agreement through his counsel with Mr. Woodcock, Special Assistant to the Attorney General, to the effect that if pleas of guilty were entered by the other defendants he would dismiss the indictment and terminate the prosecution as to the appellant and others. The Court said (p. 849):

> "It is elementary that an indictment may be dismissed and the defendant reindicted for the same offense, if he had not been put in jeopardy. Appellant cites a number of cases to the effect that the United

States is bound by an agreement entered into by her counsel in a civil case; other cases holding that where revenue claims have been compromised and paid criminal prosecutions are barred, and other cases holding that where witnesses have been compelled to give testimony against themselves before an investigating authority immunity results. It would be useless to review these cases, as none of them are in point, and we are not aware of any decision, either controlling or persuasive, that would support the contention of appellant. We have no hesitancy in holding that the government was not estopped to prosecute appellant in this case regardless of whether an agreement was made as alleged. The assignment is without merit."

In the case of *United States* v. *Ford*, 99 U. S. 593, the question involved was stated by this Court as follows (p. 598):

"Waiving, for the present, the question whether the district attorney may contract with an accomplice of an accused person on trial, that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider in the first place whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice, that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offense; and if so, whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution."

The lower Court had answered in the affirmative. After considering the matter at some length, this Court concluded as follows (p. 606):

"Having come to the conclusion that the district attorney had no authority to make the agreement

alleged in the plea in bar, it follows that the circuit court erred in the two cases instituted there, in overruling the demurrer to it, and that the judgment must be reversed, and the causes remainded for further proceedings in conformity with the opinion of the court."

To the same effect see:

Gladstone v. *United States,* 248 F. 117;
Cases cited in annotation in 85 A. L. R. 1177.

Petitioner contends that it is unfair and oppressive to permit more than one prosecution to grow out of the same transaction. In answer to this contention, the Court of Appeals said: (Op. pp. 5, 6).

"The opinion of Judge Newman urges that where the statutory definition of offenses is such that more than one may grow out of the same transaction, it is oppressive for the prosecution to file and prosecute several charges successively, that either all should be filed and disposed of at one time, or the prosecution limited to the first it selects and presses to conviction. But the definition of offenses is for the legislative authority, and the determination of whether and when to prosecute for more than one growing out of the same transaction is a matter of policy for the prosecuting officer and not for the determination of the courts. Moreover, while under some circumstances it might be unfair to prosecute for more than one offense, under others the danger to the public from the conduct of an offender might be such as well to warrant his prosecution for all offenses committed. There is an insufficient disclosure of the circumstances of the instant case to warrant any conclusion, even if we had authority to reach one, as to whether the action of the Corporation Counsel's office in the instant case was fair or not fair."

CONCLUSION

For the reasons hereinbefore stated it is respectfully submitted that the petition for writ of certiorari should be denied.

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